

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5670

**APPEAL OF GAITHERSBURG RECYCLING CENTER LLC
(by Mark Goldstein)**

OPINION OF THE BOARD

(Hearing Dates: December 19, 2001 and January 23, 2002)
(Effective Date of Opinion: May 23, 2002)

Case No. A-5670 is an administrative appeal in which the appellant charges administrative error on the part of the Department of Permitting Services in its issuance of a Violation Letter, dated September 5, 2001, which states that a number of the activities conducted in connection with operation of the recycling center, violate the Montgomery County Code.

Pursuant to Section 59-A-4.3 of the Montgomery County Zoning Ordinance, the Board of Appeals held hearings on the appeal on December 19, 2001 and January 23, 2002. Scott C. Wallace, Esquire appeared on behalf of the Gaithersburg Recycling Center. He called as witnesses Mark Goldstein of the Gaithersburg Recycling Center, Tom Gallagher, an expert in construction management and Dave O'Brien, an expert in engineering. Malcolm F. Spicer, Jr. Esquire appeared on behalf of Montgomery County. He called Susan Scala-Demby of the Montgomery County Department of Permitting Services, as a witness.

Decision of the Board: Administrative Appeal **denied**.

EVIDENCE PRESENTED TO THE BOARD

1. The subject property consists of approximately 135 acres located at 8701 Snouffer School Road, Gaithersburg, Maryland. The property is zoned I-4, low intensity, light industrial.

2. Gaithersburg Recycling Center, LLC leases approximately 117 acres and intends to buy and develop the entire site.

3. Gaithersburg Recycling Center, LLC has been operating a rock crusher at the subject property and crushing concrete and asphalt for use as on-site fill material under the sediment control permit issued by the Department of Permitting Services. This use of the rock crusher to create fill material for use on the site was considered to be an accessory use to the sediment control permit. (Exhibits 17 a-c) and approved by Randy Wyrick, former zoning Program Manager for the Department of Permitting Services, by letter dated March 21, 2001. (Ex. 14) Sediment control permits are issued pursuant to Chapter 19 of the Montgomery County Code. These permits do not grant land use authority.

4. The subject property was inspected in August, 2001 by Susan Scala-Demby, the current Zoning Program Manager for the Department of Permitting Services. Following this inspection, a determination letter was issued by Robert Hubbard, Director of the Department of Permitting Services on September 5, 2001 (Ex. 3) which listed five violations. Gaithersburg Recycling Center appealed the determination of the first four listed violations to this Board.

5. Gaithersburg argues that use of the rock crusher to create fill material for use on site is permitted as part of the preparation of the site for building construction.

6. Mark Goldstein, General Manager testified that the fill operation and use of the rock crusher on the site would take from four to seven years to complete and would result in placement of five million cubic yards of fill material. Trucks transport the asphalt and concrete to the site where it is run through the crusher. Each truck contains about 10 to 12 cubic yards of concrete or asphalt or both.

7. There are no pending building permit applications for any building construction on the site. There is no approved development plan of any firm for any part of the property. The ability to develop the property to any degree is severely limited because the property is in a moratorium area due to inadequate traffic facilities.

FINDINGS OF THE BOARD

8. The Board concludes that the use and operation of the rock crusher at this site cannot be considered as a permitted activity associated with building construction under the zoning ordinance. Rather, the use and operation of the rock crusher under the circumstances involving its use for four to seven years and creating five million cubic yards of fill constitutes a principal or main use which is not permitted in the I-4 Zone under Section 59-C-5.21. Under the Montgomery County Zoning Ordinance, rock crusher, washing and screening plants are only permitted in the I-2 Zone.

9. The Montgomery County Zoning Ordinance defines accessory use as "A use which is (1) customarily incidental and subordinate to the principal use of a lot . . ." Under the facts and circumstances of this case the use and operation of the rock crusher is not incidental or subordinate to any principal use, as it is, in fact, the principal

use. Nor can the operation and use of the rock crusher be considered as customarily incidental and subordinate to the sediment control permit which is not a use at all but rather a permission given to allow land disturbing activities on the site under Chapter 19 of the County Code. Accordingly, the Board finds that paragraph 4 of the September 5 letter finding the operation of a rock crusher at the site to be a violation of the Zoning Ordinance is correct.

10. DPS determined in its letter of September 5, 2001 that construction debris consisting of concrete, steel, rebar, and storm drains had been delivered to the site for recycling. Testimony by Susan Scala-Demby as well as photographs confirmed this. Montgomery County Zoning Ordinance, Section 59-C-5.21 allows a recycling facility in the I-4 Zone but footnote 30 to that permitted use prohibits recycling construction or demolition debris, accordingly, the Board finds that Paragraph 1 of the September 5 letter of DPS is correct and that separation and/or recycling of construction debris must cease. Clean concrete without rebar or steel can be received and stored at the site subject to the limitations on outdoor storage.

11. Testimony revealed that a tub grinder was no longer being used on the property for the manufacture of mulch but that mulch continued to be stored on site and delivered. Testimony of Susan Scala-Demby establishes that outdoor storage is a permitted use in the I-4 Zone and storage of mulch would be permitted provided that a use and occupancy permit is obtained and the storage is in compliance with footnote 15 in Section 59-C-5.21 relating to storage, outdoor, accordingly, paragraph 2 of the September 5, letter is correct and outdoor storage of mulch must cease until a use and occupancy is obtained and the height of the piles must be reduced.

12. Evidence establishes that concrete, asphalt, fill material, and mulch are being stored in the site. This constitutes outdoor storage. Use and occupancy must be obtained for this use and the height of the piles must be reduced to comply with footnote 15 in section 59-C-5.21. Paragraph 3 of the September 5, letter is correct.

Based upon the foregoing the Board finds that the Department of Permitting Services correctly found the above-described activities to violate the Montgomery County Code, and that the appeal must be **denied**.

On a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Donna L. Barron, Louise L. Mayer, and Donald H. Spence, Jr. Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 23rd day of May, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

